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In the Supreme Court of the United States

October Term, 1935.

Number [redacted] 31

THE VILLAGE OF EUCLID AND HARRY W. BUSH,—
INSPECTOR OF BUILDING,

Appellants,

vs.

THE AMBLER REALTY COMPANY,

Appellee.

REPLY BRIEF OF THE APPELLANTS.

JAMES METZENBAUM,
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Counsel for the Appellants.

In the Supreme Court of the United States

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The Village of Euclid and Harry W. Stein — Inspector of Building,
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TABLE OF CONTENTS.

The Ambler position was altered in its oral argument 1
Is the Ambler brief Right or Wrong? 2
The Ambler brief and its Own citations do Not agree 3
The Ambler brief Omits the Pivotal words "Whole" and "If" 4
Kunkle makes Two Million for Ambler, in One day .. 7
Plaintiff witness-Witzel's testimony Not Correctly pictured in Ambler brief 9
Why did the Ambler brief cite the Following? 10
Is it the Ambler Brief or the Testimony which must show damage? 13
Can the Ambler Brief support itself by Ambler's Own Testimony? 15
Such use would not require a zoning ordinance 18
This justifies a contrary decree 18
As to that "Leafy Hillside" 19
As to "Churches," "Schools" and the like 22
The Facts as to Churches in Euclid Village 26
As to the "Lowlands" 27
What Mr. Ambler said 27
The Wealthy live far away in the Very Lowest lands 29
As to Amendments 30
This State Enabling Act requires this three-fourths vote 32
Congress also required this 32
Perhaps in Ohio this provision is a nullity, but that will Not aid complainant 33
Even if correct, this would Not help Plaintiff 33
But complainant ought not be heard on this score 34
Invalidity of one Section does not destroy ordinance 35
The Coming Smoke 35
Other Errors in Oral Argument 36

As to available store frontage 38
Hundreds of stores possible along Euclid and two thousand throughout entire Village 39
Notwithstanding failure to prove damage, the complainant seeks to strike down the Entire Ordinance 41
The Federal Constitution fits all 41
Not meant as an exordium, but intended as an Aid to this Court 43
What actual proof of damage 47
These are cardinal rules 49
Subsequent Court decisions do not agree with Trial Court 51

Authorities Cited.

Chicago R. R. Co. vs. R. R. Commission, 242 U. S., 280 Fed. at 395 25
Cummingham case, 97 O. S. 130 40
"Friend vs. Chicago," 261 Illinois 16 51
Hadacheck vs. Los Angeles, 239 U. S. 394, 395, and 410 .....18, 44
In Re Russell, 158 N. Y. Supplement at page 162 18
Manhattan Co. vs. Des Moines, 193 Iowa 1096 18
Merrick vs. Halsey & Co., 242 U. S. page 590 25
State vs. Cunningham, 97 O. S. 130 44
Welsh vs. Swasey, 214 U. S. 91 44
Western Foundry vs. Salt Lake City, 55 Utah, at pages 447, 452 and 455 18
Act of Congress of March 1, 1920, (66th Cong.—No. 153—H. R. 6863) Section 4 32
New York State Act of May 15th, 1917, § 83 30
Ohio Constitution, Article XVII, Section 3 33
Ohio State Enabling Act, Section 4366-11 32

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The brief of The Ambler Realty Company having been filed so few days before the hearing, made it quite impossible to file a Reply brief prior to the argument, and so, application having been made for leave to file a Reply brief and this application having been granted, the Appellants invite the attention of the Court to the following subjects which were stressed in the Ambler brief as well as in the oral presentation of the Ambler cause before the Court.

An earnest effort will be made not to repeat what has been set forth in the Affirmative brief of the Village.

The Ambler position was altered in its oral argument.

First: In the trial court the Village understood the Ambler position to be principally founded upon the theory that Zoning and Districting Ordinances are *basically* unconstitutional and although the Bill of Complaint and the oral argument of The Ambler Company in the trial Court did make reference to the claimed damage to the Ambler property, yet the outstanding feature was the assailment of

the ordinance upon the fundamental question of constitutionality. Likewise, the opening paragraph of the Ambler brief speaks of the basic question as the important and prominent one to be decided.

Though we have no stenographic record of the oral argument before the Supreme Court, it prominently stands out in our recollection that counsel for The Ambler Company, in the very opening sentences, asserted that the Complainant was not so much insisting upon the fundamental principle of unconstitutionality of Zoning and Districting ordinances, but was primarily relying upon the unconstitutionality of this ordinance in respect to its application to the particular parcel belonging to the Complainant. This apparent reversal of the importance of the two questions, makes it important that the question of damage be definitely determined and for that purpose we beg the indulgence of the Court.

Is the Ambler brief Right or WRONG?

SECOND: In the recent Ambler brief and oral argument, emphasis was placed upon the fact that it claimed damage resulted to it from the ordinance. In our affirmative brief beginning at the lower portion of page 16 and concluding with page 32—with an intention of complete fairness to the situation and honesty toward The Ambler Company—the Village attempted to show that there not only was no damage to the Complainant's property but that the ordinance actually *enhanced* the value thereof. In aiding the Court to follow this testimony and with the purpose of not trying to take mere unjustifiable or misleading "snatches" from the Record so as to thereby create false impressions, we purposely referred to the testimony of *all* of the witnesses and gave as much if not more prominence to the testimony of the Ambler witnesses than to that of the witnesses for the defense.

The Ambler brief and its OWN citations do NOT agree.

(2) At several places and particularly between Pages 16 and 32 of the Affirmative brief, the Village submitted that (except by way of injuring the public safety and welfare by bringing tracks and factories up to the Euclid Avenue line) the Complainant would be unable to show that the testimony proved damage under the facts as they *actually exist* under this ordinance, and so the Village awaited that portion of the expected Ambler brief which would cite testimony that established damage; and now that the Ambler brief has been filed, the Village heartily re-affirms that though the Ambler brief *alleges* damage, yet the very references to the testimony, contained in the Ambler brief, show precisely the contrary under the facts as they exist by virtue of this Zoning ordinance, as will be presently found.

(3) Before pointing out the difference between the *assertions* in the Bill of Complaint and in the Ambler Brief on the one hand, and the *actual testimony* on the other hand, we feel it necessary to invite the attention of the Court to the fact that this case was not argued upon demurrer in the trial court nor was any oral argument offered after the testimony was completed. As stated in the opening paragraph of the Trial Court (Page 52 of the Record): "This case is obviously destined to go higher. On appeal in equity cases, the reviewing court weighs the evidence and when taken in deposition form it can do so as well as the trial court; hence it is unnecessary to make special findings of fact." The oral argument in the Trial Court was on Friday, December 21st, 1923. Reference to the dates printed in the Record at the beginning of each deposition will show that at the time of the oral argument, neither Ambler (page 135 of Record), Witzel (page 147), Zimmerman (page 165), Greenlund (page 179) nor Laronge (page 196—December 29th) had then testified. Be-

cause the so-called basic "Constitutional Question" was the big point involved, the question of damage was then regarded as but comparatively inconspicuous. But now that the Record is completed and the Village has found the trial court asserting that "none of the important or controlling facts are in dispute, with the single exception of the extent of that damage," and now that the Village finds that in its oral argument before the Supreme Court, the Ambler company takes the position that damage was both proved and conceded, and now that the Village has witnessed the Complainant's alteration of its principal position from that of basic unconstitutionality to that of unreasonableness toward and damage to the Complainant's particular piece of land, the Village feels that it doubly owes the duty to this Court to point out the difference between the *assertions* in the Ambler brief and the *testimony* which the Ambler brief cites as supporting its own assertions. The succeeding parts of this Reply brief ought to make it clear whether the Ambler brief is correct or wrong:

(4) Under the title of "EVIDENCE OF VALUE AND DAMAGE" at the top of page 8 of the Ambler brief, and proceeding on to page 13 thereof, the Complainant refers to the proof upon this score. We wish to trace these pages step by step and compare the text of the brief with the actual testimony referred to therein.

The Ambler brief OMITS the Pivotal words "WHOLE" and "IF."

(a) The first four lines on page 8 bring us to one of the several outstanding weaknesses in the Complainant's position, for their principal witness did testify at the bottom of page 72 of the Record as well as toward the lower portion of page 85 that the Ambler Parcel would be worth less under the ordinance than it would be without the

ordinance, *but* that difference was predicated and founded and built upon the *supposition* that the ordinance designated the *whole* of the sixty-eight acres for residence purposes only, which supposition this Court now understands as being opposite to the facts as created by the ordinance, for the ordinance itself does not designate more than approximately 38% of the sixty-eight acres for residence purposes alone. On the contrary, the ordinance properly leaves all of the available land near to the railroad, free and open for industrial and manufacturing uses, and 130 feet more for industrial accessory uses. *If*—as supposed and premised by the witness Kunkle—the ordinance had forbidden industry and manufacturing to locate along the railroad track and *if* the ordinance had permitted nothing but residences to be constructed along and adjacent to the railroad track, then the supposed premise upon which this witness based his testimony would have been correct and there might have been a lessening of the value, for the use of the land next and adjacent to the track might have robbed that portion of the land of its intended purpose because it would be quite possible that less might be gotten for residence use next and adjacent to the track than for manufacturing purposes, and indeed most people would not want to reside so close to the track. All of this was based upon a supposition directly in conflict with the situation created by the ordinance, because all of the land next to and a wide area of approximately 1000 feet adjacent thereto is open to industrialism and accessory uses, so that the whole of the sixty-eight acres is by no means limited to residence purposes alone. Nor does it by any means follow that more could be gotten from the districted portion than if it were undistricted, for (as hereinafter shown) testimony of *very great* weight was to the contrary. But even without such defense testimony showing greater and earlier income from this districted portion *as* dis-

tricted, it is the duty of the complainant to have furnished *direct* proof of a lessening of value under the facts as actually exist under the ordinance, and it is not permitted to complainant to ask this Court to *presume* that the witness *might* have testified to a loss under the facts as they really do exist under the ordinance. Indeed, such a presumption would contradict not only the weighty testimony of the majority of the witnesses, but would clash with the testimony of this same witness who (toward the lower portion of page 92 of the Record; again at the bottom-most line of 92 and at the middle of 93) testified that: "The *natural* and *logical* way for the development of that property immediately north of Euclid avenue (which is the districted strip in question) is by allotment for workingmen's homes." It is apparent that the testimony here cited by the Ambler brief does not support the assertion of the brief.

The other reference cited in the fourth line of page 8 of the Ambler brief, to wit: page 85 of the Record, similarly *fails* to substantiate the assertion in support of which it is cited for it plainly shows that this testimony of their principal witness was based upon the supposition of the whole sixty-eight acres right down to the railroad track being designated for residence purposes alone, for this witness stated:

> "Taking the Ambler Tract of sixty-eight acres as described in the Petition, if that acreage as a *whole* were restricted to residence purposes, I would say that its market value would be less than one-third of what it would be for industrial use."

The brief of the Ambler company in the first and second lines of page 8 uses the words "as a whole," and rightly this brief should have repeated these same words after the word "restricted" in the third line of page 8, so that

the brief should then have read: "If restricted *as a whole* to residence use, one-third of such value." At the lower portion of page 21 of the Village affirmative brief as well as upon pages 22 and the upper portion of 23 thereof, this fallacious supposition was pointed out by the Village.

(5) The Village never anticipated that the trial court might have misunderstood the fallacy of this supposition as distinguished from the actual facts, so no effort was made in the trial court to point out this or many other reasons which disproved damage and which really established an enhanced value; but now that these assertions relatively form the principal basis of the complainant's position and now that the brief of the complainant contains assertions which the defendants honestly believe are not supported by their citations, the defendants feel that they would be remiss in their duty toward this Court if they did not offer this aid which the Court has the right to expect of counsel. Not for any mere purpose of winning, but as a solemn duty because of the trust reposed in us, we invite the further attention of this Court to the succeeding pages hereof.

Kunkle makes TWO MILLION for Ambler, in One day.

(b) Before leaving the subject of damage as referred to in the Ambler brief, it is to be noted that the same principal witness—Kunkle—when he appeared on December 18th, 1923, gave the unrestricted value of this property as but $9000; whereas when he appeared the next day —December 19th—by a specious method of calculation he worked up the same piece of property to a valuation of $44,000 per acre in the last paragraph of page 85—a difference of $35,000 per acre, or a total difference of $2,380,000.00 for the 68 acres, in one short day. The sophistry of Kunkle's position whereby he reached this figure

and the plain injury therefrom to the public, was set forth in the upper paragraph of page 19 of our affirmative brief.

(c) It is true that the complainant's brief pretends to meet the invitation which was extended in our affirmative brief, but the citations to the Record as set forth in the Ambler brief itself do *not,* we submit, justify the assertions contained in their brief. Under other circumstances the omission of an "if," or the failure to repeat the word "whole" may not be of great importance, but the Village feels compelled, under the present circumstances, to characterize these omissions in the Ambler brief as *tremendous trifles.*

(d) Before going forward we pause to say that we know that the Court will not be unmindful of the fact that, though the Euclid avenue frontage and approximately 620 feet therefrom has been districted against factories, this is for the purpose of preventing a condition along Euclid avenue which would be subversive of the public welfare, safety and health; for it was intended to prevent the bringing of railroad switches and engines up to Euclid avenue, which is the very right that the complainant strove to establish by each of its witnesses; for Kunkle, Witzel and Ambler frankly based their testimony upon the theory of "having tracks and factories right up to Euclid avenue" in order to create their values, and upon the right to be "unrestricted in *every* way." (Please see pages 18 and the middle of page 19 of Village affirmative brief where this *important* phase is plainly set forth.) That point is to be quite distinguished from the question as to damage; for it is presumed that the Police Power is admittedly sufficient to prevent a use which would or might be so plainly detrimental to the community and its health and welfare.

Plaintiff witness-Witzel's testimony Not Correctly pictured in Ambler brief.

(6) Proceeding next, to page 9 of the Ambler brief we find the testimony of their other witness—Witzel—described as showing a valuation of $3000 per acre, and in support thereof the Ambler brief cites page 154 of the Record. It is quite inconceivable that the brief should ascribe to him this valuation when it is so apparent that Mr. Witzel had, prior to page 154, testified to the effect that the land nearest to the track was the most valuable, and yet after the Ambler brief ascribed to Mr. Witzel a valuation of $8500 to $10,000 per acre, this same brief quotes this same witness as placing a valuation of but $3000 per acre on the 1100 feet nearest to the track. The brief of the Ambler Company is correct in quoting Mr. Witzel at page 149 of the Record as to a valuation of $8500 to $10,000 for the whole parcel undistricted, but we submit that since Mr. Witzel had testified (what is perfectly apparent even without his testimony) that the land next and near to the track would be worth certainly as much or more than the land nearer to Euclid avenue, the brief does not do justice when it attempts to picture Mr. Witzel's testimony as showing that the 1100 feet nearest to the railroad track would be worth only $3000.

We have just referred to page 210 of the typewritten transcript of Mr. Witzel's complete testimony as it was taken at the time his deposition was given. There, beginning at the first line of page 210, the following appears, except that we have italicized several words:

"Q. The red piece, alone, 1100 feet in width?

A. I should say that that property ought to be worth *ten* thousand dollars an acre.

Q. *Ten* thousand dollars an acre, just as it stands, would you say?

A. Yes, the red property."

The Ambler company has a carbon copy of this complete testimony so that we could not possibly misquote and indeed this is so apparent that the attempted capitalizing of this is quite inexplicable. The narrative Record itself shows that Mr. Witzel was ascribing a value of at least $10,000 and perhaps even more to the 1100 feet near to the railroad track, and for both of these reasons the Village finds itself rather astonished to notice the brief of the Ambler company ascribing to this witness a valuation of but $3000 per acre nearest to the track, under the ordinance. In the same way their brief refers to page 151 of the Record, but it fails to refer to the upper four lines of page 161 wherein witness Witzel conceded that in four years "not a single factory had been built in the entire Village of Euclid, except one, since 1920," according to his best recollection.

Undoubtedly this plaintiff witness was a disciple of Talleyrand; firmly believing that the purpose of words is to conceal one's thoughts; for his testimony is so full of circumlocution and so "hop-skip" that one has difficulty at times in determining what this witness really meant; but the least that can be said is that he did not clearly or adequately prove—as is incumbent upon the complainant to do—any damage to the complainant's land by virtue of the ordinance.

Why did the Ambler brief cite the Following?

(7) Next taking up the question of witness Laronge, whose testimony is treated at the lower portion of page 9 and the upper half of page 10 of the complainant's brief, it is proper to have quoted Laronge as fixing a valuation of $8,000 per acre for the complainant's land if undistricted, but we respectfully submit that the attempt to picture this witness as giving but a $2,000 value per acre

under the ordinance and the attempted support thereof by quoting page 202 of the Record, is in striking *contrast* with the real and actual testimony as given by this man, who is conceded to be the leading figure in Cleveland's real estate affairs. The Ambler brief pretends to picture Laronge as having testified to a valuation of but $2000, whereas an inspection of the 6th to the 12th lines of page 202 shows the following, except that we have italicized certain words:

> "*Eliminating* the Euclid Avenue *frontage entirely,* and taking the land north of that between Euclid Avenue and the *Nickel Plate track,* I would say that to a man engaged in the business of buying tracts of land for allotting and selling for residence purposes, considering the present market, assuming that streets would be cut in there but *no Euclid Avenue frontage,* again depending upon the lay of the tract, it would be worth about $2000 an acre."

From this quotation—which is the very portion referred to by the complainant's brief—it is apparent that the witness was required by the Ambler attorney, to testify on the *supposition* (1) that the complainant's parcel would be used and was restricted for residences alone *right up to* "the Nickel Plate track" itself, which is a supposition at variance with the facts under the ordinance; and it is further apparent (2) that the witness was required by their own question to "eliminate the Euclid Avenue frontage entirely" and was including "no Euclid Avenue frontage." Under these circumstances we do not believe that the Ambler brief is warranted in making the assertion as it does at the lower portion of page 9, to the effect that this witness gave a valuation of but $2,000 as compared with the unrestricted valuation of $8,000.

We respectfully submit that this assertion in the Ambler brief and this attempted substantiation by citing page

202 is shown to be even more unwarranted if one will but read this same witness's testimony just below the middle of page 197 where he testified that the part districted under the ordinance for residence would really bring *more* per acre than if that portion were used for industrial purposes, for he testified that the industrial purpose use would give a value of $8,000 per acre where as if this 620 foot strip near to Euclid Avenue were used for residence lots and even without the improvements thereon being paid for, it "*would run a little better than $11,000* an acre, figuring six lots to the acre." So that the Ambler brief not only mispictured page 202 but it also entirely overlooked page 197. The complainant's brief further blinds itself to the following two sentences which boldly stand forth on page 199 of this witness's testimony and which read as follows:

> "There is *no* demand for that frontage (Euclid Avenue) for retail business property if it was unrestricted, and it is difficult to say what its value would be for that purpose. If there were a demand for stores in there, I would say it would be worth anywhere from $75 to $100 a foot for stores. I do *not* mean to say that the mere lifting of these restrictions would make it so that you could go right out and get $100 a foot for it. I *don't* think there is a market right there for business property now."

> "As to the purpose for which that property is most available at the present time, in my judgment, all this vacant property between Euclid Avenue and the Nickel Plate track, throughout the length of the Village, if I understand your question, I would say that all of the property referred to could be disposed of *more* readily as residence sites than anything else, I mean at the present time, for the reason that the demand for residence property in this section exceeds that for manufacturing sites, chiefly because of transportation."

In addition to these quoted portions, the Ambler brief fails to refer to the *further* increased value which this witness testified as possible to come from the diminishing of the amount of land available for industrial purposes as shown in the concluding paragraph of page 198 of the Record.

Is it the Ambler BRIEF or the TESTIMONY which must show damage?

(8) The Ambler brief next treats of the defendant's witness Greenlund, and though the brief must be applauded for adroitness, it can hardly be credited with a fair picturing. The Court will but need to read the quotation at the lower portion of page 28 and pages 29 and 30 of the Village affirmative brief (and we beg the Court to do this) to see that this witness painstakingly proved, step by step, that the ordinance very materially and very substantially *increased* and enhanced the value of the complainant's land. It is needless to show the variance between the Ambler brief at the bottom of page 10 and the actual testimony of this witness, further than to read the above referred to quotation (pages 28, 29 and 30 of Village brief) and the testimony of this witness at the upper half of page 182 of the Record, except to invite the attention of the Court to the two additional facts: that the pretended quotations from pages 194 and 187 of the Record, as shown at the upper portion of page 11 of the Ambler brief are quotations which, to say the least, are not faithful to the testimony of this witness; for this witness emphatically declared at the upper portion of page 187 that:

> "Euclid Avenue along there (in Euclid Village) is likely to work out as a commercial street *eventually* but not *now.*"

And again, at page 195 this witness said:

> "I am contending that this is allotment property today and ready and ripe for development. It is *not* ready and ripe for development as factory property, even in small parcels."

The little extract which is quoted in the complainant's brief as coming from page 194 of the Record is not fair to the testimony, for it is but a sentence taken out of a solid paragraph and it really does violence to the plain intent and testimony of this witness who was the former Lieutenant-Governor of Ohio and whose testimony throughout exhibits intimate knowledge of the particular situation. This entire paragraph, with italics supplied, reads as follows:

> "I have said that, as Euclid Village develops, Euclid Avenue would *eventually* be a business street. Just how soon that would come we can only guess; it might come faster than I said, and it might come slower. I think it is fair to assume that business and manufacturing will be located north of Euclid Avenue and dominate that section. The residence section will *not* be entirely south of Euclid and north of the New York Central tracks. I *don't* believe that the business section will be very much deeper than 150 or 160 feet along Euclid Avenue. Assuming that that is true, I *don't at all* also assume that if natural developments were permitted, the territory north of that 150-foot line north of Euclid Avenue would eventually develop for manufacturing or business purposes. *There would be quite a large strip of residences in between,* and that is true of every business street."

The forcible extraction by the complainant, of one sentence out of a paragraph can best be likened to the unbeliever who invited a minister to read the top line of a page of the Bible, where it was written that: "There is no God." Thereupon the minister thumbed back to the bottom lines of the previous page where he disclosed the preceding words: "Sinful is he who says that"

Can the Ambler BRIEF support itself by Ambler's OWN TESTIMONY?

(9) The Ambler brief next gave its attention—on page 11 thereof—to the testimony of Mr. Ambler himself and here we find exactly the same failure to insert the word "whole" as in the Kunkle situation. Mr. Ambler did say at page 135 of the Record that the value of the sixty-eight acres would be but $2000.00 per acre, but his testimony clearly shows that this valuation was upon the *assumption* that the whole and the entire sixty-eight acres *right down to the* railroad track were districted for residences alone, which is an assumption contrary to the facts under the ordinance; for the available portion of the land which lies adjacent to the track is open and unrestricted for industrial and manufacturing purposes and is not limited to residence purposes alone, and the next 130 feet is open to use for clerical and office and restaurant and other purposes accessory to factory purposes.

We fully invited attention to this situation and to this fallacious assumption, in the last paragraph of page 22 as well as on page 23 of the Village affirmative brief, and yet the Ambler brief attempts to cite this just as though this assumption had not been made the basis of that testimony.

(10) Concluding with the testimony of witness Stein on page 12 of the Ambler brief we beg to cite the Court to the last paragraph of page 30 of our affirmative brief and to the following excerpt from Mr. Stein's depositions which fairly pictures his entire testimony: "In my judgment, I would say that the Ambler tract is worth *more* for homes than it is for factories, because there is no factory value, no factory demand." And this testimony was founded upon the intimate experience of this witness de-

tailed by him in reference to a great many real estate transactions within the Village of Euclid.

(10b) *The Ambler Brief Skips over This:*

Beside Laronge, Stein and Greenlund's testimony showing no damage under the ordinance, there is the testimony of Whitten which, however, is entirely "neglected" by the Ambler brief. May we ask the Court to read the *increased* valuation set forth by Mr. Whitten on page 119 of the Record, beginning at the middle of that page, for it truly is worthy of being read.

(11) We have not taken the space to deal with the values referred to in the Ambler brief as applicable to other parcels East and separated from the parcel in question, because we think that there is sufficient difficulty for the Court as well as for the parties to keep the figures in mind in so far as they refer to this one particular parcel without bringing in countless other figures in reference to other locations.

For the same reason we have not attempted to delineate the fallacy as to the so-called store values, for these are but mythical, because everyone did and must concede that greater and much earlier returns can be gotten for residence than for store use along the complainant's land as well as along most of the thoroughfare because there is no demand for store use, and indeed this is virtually conceded at the bottom of page 11 of the Ambler company's brief which admits that "only a little more (can be gotten out of the Euclid Avenue frontage) if unrestricted against business, because he (Mr. Ambler) thought that there was little, if any demand for business, along that frontage, except at strategic corners." (And—as shown hereinafter—every one of those corners has been districted for business.)

(11b) We beg to say to the Court that the testimony was being taken all day practically each day and the briefs had to be in the Trial Court before January 1st, and as the last testimony was not completed until December 29th, the Village was necessarily compelled to get out its brief during the night hours and because the "big" and "new" question was the legal and basic one and because this "important" question required as well as warranted most studious and undivided attention and because of the limited time, the Village in its own brief in the Trial Court did not at all treat with the testimony. There having been no oral argument after the testimony was completed, it was therefore quite impossible for the Village *itself* to have given to the Trial Court any aid upon this score. With an earnest and genuine respect for the Trial Court, the Village believes and sincerely feels that the Trial Court misconceived the effect of the testimony, for enhancement and not damage unrelated to the public welfare is the effect thereof.

It is with genuine reluctance that we have asked the Court to again go over this phase of the subject, but because the Ambler company in this Court apparently altered its primary form of attack and made its principal basis that of damage and because the brief of the complainant makes pretense of substantiating its assertions by citations that really do not uphold the brief, we have felt it our duty to this Court, to the ten thousand persons who live in the Village and the countless others throughout the entire country, to aid the Court in having the real and the actual facts brought to its attention.

In doing this our earnest esteem for the Ambler counsel is not one whit diminished; for our affectionate regard, of so long standing, really grows warmer year by year.

(11c) The benefit to the public welfare, safety and health by having the 620 foot "buffer" between the factories and Euclid Avenue, and the fact that the best use of the 620 foot strip would be just as the ordinance provides, were conceded by virtually all of the witnesses for plaintiff as well as defendant, as is fully set forth on pages 17 and 29 and especially page 35 of the Village affirmative brief. And this 620 foot area, as pointed out in our affirmative brief, gives excellent opportunity for future streets parallel to Euclid, so as to relieve the growing congestion and also supply a *third* "back" street for factory trucking.

Such use would not require a zoning ordinance.

(11d) In final, the Village submits that it really would be unnecessary to resort to a zoning ordinance in order to prohibit switches, tracks and factories from coming out to the North line of Euclid Avenue, because such a use would really be so injurious to the public safety, health and welfare as to come within the decision of *Western Foundry vs. Salt Lake City,* 55 Utah, at pages 447, 452 and 455; *In Re Russell,* 158 N. Y. Supplement at page 162; *Hadacheck vs. Los Angeles,* 239 U. S. 394, 395 and 410, and *Manhattan Co. vs. Des Moines,* 193 Iowa 1096. Such a use always can be prohibited for its plainly injurious effect upon the public safety and welfare.

This justifies a contrary decree.

(12) Temperately, but with firm confidence, the Village of Euclid meets the new position of the complainant and submits that since the ordinance must be presumed to be legal, since it is the duty of the complainant to establish damage and loss clearly and convincingly and as being *plainly un*related to the public welfare, and because

the complainant undoubtedly attempted to show its *strongest* testimony and since the assertions of the brief must really be conceded as being *un*supported by the testimony and Record itself, there is here presented just what the Village contended in its affirmative brief, namely: an apparent failure to establish the very first basis for its complaint, that is—a failure to establish damage to the complainant's land upon any proof except upon a use admittedly subversive of the general welfare and injurious to the public safety and health. In brief, the Village —weighing its words—submits that the complainant has failed in its very first requisite of establishing damage through its own testimony or through the witnesses of the defense.

AS to that "LEAFY HILLSIDE."

THIRD: When counsel for the Ambler Company was about to conclude his oral argument before the Supreme Court, he referred to the fact that the ordinance apparently denied the right to establish orphanages along the high side of Euclid Avenue and feelingly referred to the denial of the right to use this "leafy hillside" for the orphaned young.

Counsel for the Village sat in amazement as he heard the Ambler company present a picture which was diametrically opposite to the testimony which the Ambler counsel themselves had brought into the Record. Neither court decorum nor good manners permitted any interruption or correction. If the Court will turn to the bottom of page 171 it will find the testimony of General Zimmerman, mayor of the Village of Euclid. In that testimony, brought out by Ambler's counsel, it is clearly shown that approximately opposite the Ambler parcel there are two such institutions—one being a Home for Children across

the street but a little west of the Ambler parcel and fronting on the South side of Euclid Avenue and being about four acres, and the other being an Orphan Asylum of over 14 acres (marked U 3) fronting on Euclid Avenue across the street from the Ambler parcel but a little to the east thereof, and a still further place of several acres in course of dedication for another Home for Children, somewhat further east (marked U 3) and fronting on the south side of Euclid Avenue.

The Children's Home which is situated opposite and a little to the west of the Ambler parcel does not appear upon the map which was introduced by the Ambler company, but the location of this is indicated in the further testimony appearing at the bottom of page 175 and the top of 176. It is immediately opposite Lamb and Iddings Avenues, 193rd and 195th Streets and next east of Genesee Road. It is a fact, and not to be disputed that these Children's Institutions are located along this very "leafy hillside" and constitute many acres thereon. It is a further fact that the whole of this hillside along Euclid Avenue is used for modest homes, is—month by month—being subdivided for more and more of modest residence allotments and is—according to the testimony of the Ambler witnesses—destined to be used for "workingmen's residences." (The small Zoning maps are not intended to show or be kept up with the new institutions or with many additional allotments which have been dedicated throughout the Village and along the north as well as all along the entire south side of Euclid Avenue so soon as the people saw that the Zoning ordinance would protect this stretch from industrial and track invasion.)

The Ambler company, as is apparent from pages 18, 19 and 20 of our affirmative brief, is contending for the unregulated right to bring factories, switches and tracks

right up to the North sidewalk line of Euclid Avenue, for that Company *seeks to strike down this entire* ordinance so that it may be completely unregulated, and in this way it would be able to establish conditions upon its land as well as all along the entire north side of Euclid Avenue, which would be detrimental to the homes and residences along Euclid Avenue. And in this way they would win the unregulated right, for which they are contending, to bring the rumble of the trains, to cast the soot and smoke, to spread the fumes and noise and gas of these engines and tracks and factories upon the very roofs that shelter these little children and upon the heads of these youngsters who *really are* housed upon the acres of land now dedicated to these homes for children and orphans.

It is to be remembered that in addition to the topography of the hillside making it unusable for business (except at the two low spots where Chardon Road comes down from the hill and meets Euclid Avenue) there is street after street of modest residences leading north from Euclid Avenue all along the territory in question, as is evident from the middle of page 101 and particularly pages 102 and 103 of the Record.

The children going to and from the large nearby school on Chardon Road (marked U 3) and the people going to and from the "center" of the Village would be subjected to the dangers and the ills of switches, spurs and factories if brought out to the north line of Euclid Avenue.

This unmeritorious desire on the part of the complainant was not penitently confessed by the complainant; but instead, the complainant attempted to picture the Village as indifferent, as cruel and unfeelingly aesthetic in barring this "leafy hillside" to orphan asylums and the like. And this was done despite the fact that the testimony as adduced by *themselves*, showed the contrary to be true and

despite the further fact that the desire "to be entirely unregulated" and to free the northerly side of Euclid Avenue must necessarily result in the injury to these defenseless children as well as to the modest homes that now occupy and, in daily increase, must continue to occupy the south side of Euclid Avenue and the entire surrounding territory.

AS to "CHURCHES," "SCHOOLS" and the like.

FOURTH: In the oral argument the Ambler counsel cited as one of the vices of the ordinance the fact that churches, schools and charitable institutions were not permitted in the residence sections but were districted down into the U 3 classification.

This is not the first time laudable purposes have been cited as examples of culpability. Neither presidents nor subordinate officials who are unjustly criticized nor certainly, speechless legislative acts can be constantly broadcasting their explanations and so usually the attackers, at first blush at least, appear in heroic roles. Perhaps a simple and frank explanation will undo the ill-founded claim of the complainant.

Municipalities can not, without being guilty of paternalism, confer with *individuals* as to the advisability of the locations which the individual may select for the home. But the municipality does owe to public and semi-public institutions and can properly extend to such institutions such advice, information and aid as the municipality possesses. Accordingly, many zoning ordinances are purposely drafted so that the school authorities, church officials and trustees of charitable organizations will be required to come before the higher officials or the Appeal Board, for the sole and single purpose of lending to such institutions such aid, or of giving them such information

as may be within the power of the officials of the municipality. Several examples might be cited, among them that of school authorities who optioned a parcel under the mistaken belief that a highly dangerous next door occupation could be abated if the school built there. This probable costly error was corrected in time by the Board because that particular ordinance required a special permit, so that zoning ordinance in reference to schools, churches and other semi-public institutions worked out—just as it was planned—to the advantage and to the welfare of the community, instead of the ordinance having worked an injustice which, upon first blush, might have appeared to have been the purpose of that ordinance.

In one instance a church had optioned a parcel in a zoned municipality and came with its plans and was refused its permit because in that instance that particular zoning ordinance districted churches into a low classification whereas the location optioned by the church was in a higher classificaton. Accordingly the Inspector of Building promptly referred it to the Board who conferred with the church trustees. At this hearing or conference, the Board and the City Planning Commission informed the trustees that of course it would recommend the church establishing wherever it pleased and in whatever district or classification it desired but that the municipality in the construction of its sewage plant and its sewer system had just been instructed by the State health authorities and engineers that the most available location for running its largest pipes would be immediately next to the location optioned by the church and that since this sewage work would require some years before completion throughout the municipality, the parcel adjoining the proposed church site would be constantly "torn up" and would eventually not be as desirable as it then appeared to be. The drainage and topography caused the State engineers to feel

that particular location to be necessary. The trustees were grateful for this information and appreciated the aid and thereupon selected a site within the same residence district but somewhat removed from the original location, and promptly, by unanimous official action, the church found itself welcomed in the U 1 residence district, because the sole purpose of placing the schools, churches and charitable organizations in a low classification in that particular ordinance, was in order that these institutions might be required to come before the Commission for the very purpose of avoiding injury and mis-selection upon their part. Some ordinances are drafted upon the theory that this help could be best extended by compelling these institutions to obtain special permits and other ordinances are based upon the philosophy that by placing these institutions in a low classification they will be compelled to come before the Commission and they will thereby obtain that help to which they are rightly entitled. So that the purpose is not at all to bar them from being located in U 1 or residential districts, but merely so as to assure them of the co-operation which their public and semi-public character entitles them to receive. Perhaps some might think it equally well or better not to follow this method but to district schools, churches and similar institutions into *all* districts. The frank answer is that now since this point has been stressed it is seen that this one provision may be *possible* of being improperly employed and perhaps, somewhere, may have been mis-employed, but is not that possibility equally true of many statutes and ordinances that are admittedly legal and of long standing, recognized as valid? It can but be answered that this provision, in the Village of Euclid, has worked out to the complete satisfaction of every church and institutional applicant and that until this objection was voiced in complainant's brief and argument, no one

has ever even spoken of such objection. Indeed, it was so far from the thoughts and intentions of the commission and the council that it was never thought of. The churches —new and old—have never complained. The point is first raised by this complainant who wants to build no church or school but who seeks to strike down the entire ordinance.

(2) Now, it may be said in answer to this, that the necessary amending of the ordinance for these public institutions may be improperly withheld and that thereby they may be deprived of the right to locate where they desire. The only answer to that is the frank and honest one: that for any official to refuse such action would be so neglectful of the public welfare, so un-American and so violative of the oath and duty of these officials, that such an attitude can hardly be attributed to any official; and beyond all this, the presumption is that officials will do right and not wrong, whereas to presume an unwillingness on the part of the officials to concur in the necessary action, would be to presume that they will do wrong rather than right. Indeed, no less an authority than the United States Supreme Court has written:

> "It is further claimed that this provision is subject to the arbitrary whim of the Railroad and Warehouse Commission. In cases of this kind, however, it will be assumed that the public commission will act fairly and with reason and not arbitrarily." 242 U. S., as quoted in 280 Fed. at 395, *Chicago R. R. Co. vs. R. R. Commission.*

So too, in 242 U. S. page 590, *Merrick vs. Halsey & Co.:*

> "The contentions based on the exemption and provision are a part of that which accused the law of conferring arbitrary discretion upon the Commission. The accusation is formidable in words, but it is the same that has been made many times. We repeat, there is a presumption against wanton action by the commission."

The Facts as to Churches in Euclid Village.

(3) Now that the question has been raised by the complainant, the Village feels the liberty to answer by saying that because of the great growth in residences since the ordinance was enacted, the older churches have proved insufficient and as a result thereof several applications have been made by churches, each to be located in U 1 residential districts in the Village of Euclid and in no instance has there been any delay, but, on the contrary, the recommendation of the Commission has been *unanimous* and prompt and the authority has been voted *unanimously* in *each* instance, for it is of course recognized that an amendment for such purposes is for the general *welfare* of the community.

(4) In addition to all this, the Village points out that this complainant really ought *not be heard* upon this score, for this complainant has never applied for any permission to and does not wish to build any church or school or orphanage, but on the contrary it is calling for the *striking down of the complete ordinance* just as the *court below struck it down completely*—in order that this complainant may have the *un*regulated right to use its land, not for churches or schools or orphan asylums, but for railroad tracks, switches and factories right up to the main thoroughfare, which will bring injury to these very churches, schools and orphan asylums which lie only shortly removed from the land of the complainant and in this way every other piece of land—when the ordinance is stricken down—will likewise be unregulated and free to be used to the detriment of all of the churches, schools, orphanages and residences not only in the Village of Euclid but in the hundreds of zoned cities which house millions of people throughout this country. We believe that under the facts in the case at bar and with no ap-

plication ever having been made for any permit whatsoever, this complainant ought not be permitted to "lamblike" raise this question, for these questions may well be reserved for the time—if it ever comes—when the Village of Euclid really refuses to take such steps as will permit the locating of an orphanage, a church or a school. If the complainant would apply for a school, church or orphanage permit his flight from the Town Hall would doubtless be precipitous for he would quite certainly get what he does not want—prompt action allowing the church or orphanage.

AS to the "LOWLANDS."

FIFTH: In the oral argument great effort was made to impress this Court with a picture which would paint the ordinance as designed for mere aestheticism because the south or hillside of Euclid Avenue was set aside for a U 1 or single residence district alone, whereas other types of construction were—as the complainant said—"depressed into the lowlands" and were denied the benefits of this hillside. This was a new and unanticipated argument, for it would cause the people "in the lowlands" of Euclid to gasp. This argument was intended to picture the hill or south side of Euclid Avenue as meant for the aesthetic rich and purposely set aside for the wealthy, single-residence householder because of its height. One needs but to read the testimony of Mr. Ambler himself just below the middle of page 138 of the Record where he—showing that the south or hillside of Euclid Avenue would be for but modest homes of workingmen—testified:

What Mr. Ambler said.

"The territory south of Euclid Avenue on the north slope of the ridge and southerly therefrom, that class of territory is considered now, so far as its market is concerned, and the uses to which it could be

> put, as home sites for the skilled laborer, a *low* class of residence property, couldn't be the lowest, but it would be the *poor* laboring class."

Indeed, all of the complainant's witnesses constantly "hammered away" upon the theory that this hillside was now and necessarily would continue to be used for a very "low class and modest homes" and that for this very reason it was not important to protect this area against the damaging influence of spurs and switches and factories right up to the north line across the street on Euclid Avenue. This is evident from their other witness, Kunkle, just below the middle of page 94; their witness Witzel at top of 159 of the Record and our Affirmative brief at lower half of page 10. And yet the complainant in its oral argument tried to impress this Court with the exactly *opposite* theory, namely: that the ordinance "depresses the other uses into the lowlands in order to serve the aesthetic purpose of protecting this aristocratic and leafy hillside." If further evidence of this unwarranted picturization were desired, it would be found in the succeeding testimony of Mr. Ambler where, on page 138, he stated.

> "The home sites in the allotments that have been opened up south of Euclid Avenue (that being this very hillside) average about one thousand dollars a lot. That price is recognized as about the *lowest* price available. It is the average price that is being paid by that class of laborer."

It is a fact that the topography of the southerly side of Euclid Avenue (except at the S. E. and S. W. corner of Chardon Road) has and will always make it impossible for business or industrial use and will necessarily keep it for residence purposes—simple residences for modest people who, though characterized by Mr. Ambler as but "skilled labor occupying a low class of residence," are neverthe-

less humans and residents entitled to be protected against the invasion of a use which will be subversive of their welfare and that of the entire south side, as well as harmful to the welfare, health and safety of the whole community.

The Wealthy live far away in the Very Lowest lands.

The fact is and the Record shows at the middle of page 119 and at too many places to permit citation and it is commonly conceded, that the so-called aristocratic and "wealthy" section of the community is located in the very *lowest* part of the Village—that portion along the Lake Shore Boulevard. If the Court will refer to the defendant's "Elevation Map"—Exhibit 3 and to the Engineer's testimony on page 125 of the Record, it will be found that the altitude of Lake Shore Boulevard—along which, especially east of Bliss Road, the aristocratic homes are found—is but 25 feet; whereas St. Clair Street is 40 feet higher, and the north or low side of Euclid Avenue is 81 feet higher, being at an altitude of 106 feet. From this it must be evident that the attempted picturing of the *high* side of Euclid Avenue as having been set aside, because of its height, for residence purposes alone, for mere aesthetic reasons, and the so-called "depressing of other uses into the lowlands," was but an oratorical effort designed to build up the complainant's attempt to stamp this ordinance as being an expression of aestheticism, whereas the ordinance is founded upon and really breathes the welfare, the safety and the health of the community. The *facts* did not warrant complainant's oral assertion.

It is a further fact that much of the territory *throughout* the Village, is districted for U 1 purposes, because these portions are *now so occupied* and because (as set forth on page 167 of the Record) many additional portions

have been allotted with residence *restrictions*, which the ordinance neither did nor could undo; just as in the instance of the allotment, immediately next to the 68 acres in question, which was allotted by the president of the complainant company who restricted this allotment to residence use.

AS TO AMENDMENTS.

SIXTH: (1) Not in its brief but in its oral argument, the complainant attempted to capitalize the fact that though the ordinance required but a majority of the council in order to enact it, it needs a three-fourths vote of the council if the Board reports adversely as to a proposed amendment or if there be a given number of protests lodged against a proposed amendment. In the New York State Act of May 15th, 1917, § 83 it is required that an *unanimous* vote is needed if a given number of protests are filed, and in every other Enabling act and ordinance throughout the entire country, insofar as we have knowledge thereof, there is a provision which requires more than a majority vote in order to amend if there be a given number of protests or, in some ordinances —if there be an unfavorable report by the Board or Commission. This requirement has always been looked upon as an asset and as a *virtue* of zoning ordinances for it gives stability and permanency to the districting and it yet allows sufficient latitude for amendment when the amendment is apparently for the welfare of the entire community. One can almost hear how this complainant would have proclaimed against the ordinance by declaring that upon a mere and bare majority vote—even if there were protests or an adverse report—the council could revise a district and one can almost hear the complainant insisting that such procedure would not be adequate protection for

those who had relied upon the districts as ordained. Now that the Euclid and all other ordinances do properly safeguard and stabilize and give sufficient permanency to the districts, the complainant attempts to capitalize this very virtue as a vice.

It is evident that the Village Council would not have the time or the intimate knowledge which would be possessed by the Commission and Board. When the Commission has carefully investigated and has made full report of its favorable or unfavorable finding, what is more American and what has become more common than for the legislative body—the Council—to be at least partly guided, by such investigation and reports? The legislative power being vested and *retained* by the council, it may—by a three-fourths vote—see fit to disregard even a generous number of protests against a proposed amendment or to overrule and to refuse to be guided by the careful study and investigation of the Commission or it rightly may—by a mere majority vote—concur in the studied result arrived at by the Commission. This is no delegation of legislative authority, for the council must and does retain all legislative power, but where there are a sizable number of protests or where there is an unfavorable report by the investigating body, the ordinance should have the right to establish the number of votes required to concur in an amendment, so long as the amendment is not legislated by the Board or the Commission but is enacted and voted by the council itself.

The original New York Enabling Act did not provide for a Board of Appeals, but when it was found that this administrative division was necessary and required in order to make the ordinance workable and in order to properly function and carry on the administrative work, the Enabling Act of New York State was amended so as to

create the Board of Appeals and this Board has been held valid and legal not only in the State of New York but in many other decisions among which some are mentioned on pages 91 to 94 of the Village affirmative brief.

And when the Supreme Court of Ohio held the Cincinnati Districting and Zoning Ordinance to be legal, it apparently found no fault with the so-called Amendment Clause which, under the Cincinnati Ordinance, requires a three-fourths vote in the event of a protest.

This State Enabling Act requires this three-fourths vote.

(2) Indeed, under Section 4366-11, which is the Ohio State Enabling Act and which appears at the bottom of pages 40 and 41 of the Ambler brief, the Legislature itself has provided that a three-fourths vote be required if there be an adverse report. The amendment provisions of the ordinance are found in Section 25 on page 25 of the Record.

The so-called "model State Enabling Act" issued by the Department of Commerce (copies of which are being sent to this Court) at Section 5 on pages 7 and 8 thereof and in foot notes 30 to 37, uses the same procedure which requires a three-fourths vote for an amendment.

A search of the various State Enabling Acts and of the various municipal ordinances discloses the same kind of a provision requiring more than a majority vote for an amendment if there be a protest or an adverse report.

Congress also required this.

(3) In Section 4 of the Act of Congress of March 1, 1920, (66th Cong.—No. 153—H. R. 6863) there are the similar requirements but these provide for a *unanimous* vote for amendments.

Perhaps in Ohio this provision is a nullity, but that will Not aid complainant.

(4) Just as we, throughout, have tried to fairly treat the position as well as the testimony of the complainant, so in adherence to that method and in fairness to this Court we invite attention to the fact that by reason of Article XVII, Section 3 of the Ohio Constitution, known as the so-called "Home Rule" provision, and because of the decision referred to on page 124 of our affirmative brief—108 O. S. 245—it may be argued by the complainant that since municipalities in Ohio draw their Police Power *directly* from the Constitution, there is no need for a delegation of these powers by the Legislature to the municipalities and that therefore the Ohio State Enabling Act is not needed and that as a result thereof the State can confer no greater right nor can it diminish the right of a municipality to exercise its Police Powers and that therefore the delegation by the State to the municipalities on *condition* that the municipalities require this three-fourths vote is a mere nullity. It is doubtless true that if this delegation is *not* a mere nullity, then the State *could* legally delegate the power *subject* to the three-fourths "amendment" requirement, even though it be the admitted rule that one council itself could not impose this requirement upon a succeeding council.

Even if correct, this would NOT help Plaintiff.

Accordingly it may be argued by the complainant that the three-fourths limitation regarding amendments as set forth in the Ohio Enabling Act is a limitation which the municipalities do not need to obey for, as above stated, it may be urged that municipalities have this Police Power from the Constitution without any need of delegation by the State Legislature. If this reasoning be logical and

correct then, as we understand the situation, the complainant would not be in any better position, for even if the so-called "three-fourths amendment requirement" is a nullity in Ohio, this would simply mean that the ordinance *can* be amended by but a mere *majority* vote, and if that be true, then certainly the Appellee cannot complain, for if an amendment can be made by a mere majority vote, then the very basis of that complaint falls. This we submit, is not sophistry but is intended as frank and sound reasoning.

But complainant ought not be heard on this score.

(5) Beyond all this, as stated in other parts of this brief, the complainant making an "omnibus" assailment of this ordinance and the complainant never having sought any amendment, never having submitted any plans or applied for any permit and never having applied to the Board of Appeals, the Village feels that it is not merely justified, but, in fairness to the Court, obliged to submit that these objections are not open to the complainant in this suit but that these questions may be properly raised only when and only if a case arises which actually presents to the Court a refusal to amend after such complainant has made an effort to obtain an amendment.

Not because the Village fears to meet any of the objections urged by the Complainant, the Village nevertheless does submit that in the situation presented by the case at bar, all of the objections other than that of basic unconstitutionality and other than that of damage to the complainant which is clearly unrelated to the public health and welfare, are questions that are foreign to the situation presented by the instant case. We submit that in this cause as it comes into court, the complainant may rightly raise but two questions: (a) Damage clearly and plainly unrelated to the public health, safety and welfare and (b)

basic unconstitutionality of *any* ordinance which, in its effort to prevent uses that will be injurious to the public and in its effort to safeguard the public health, safety and welfare, districts a municipality according to height, area, proportion of lot occupancy and use.

Invalidity of one Section does not destroy ordinance.

(6) Then too, the Enabling Act at Section 4366-12 (In foot note on page 41 of Ambler brief) and the ordinance itself at Section 18 (page 26 of Record) provides that invalidity of a part shall not invalidate the *entire* ordinance and it is always the purpose of the courts to effectuate rather than defeat enactments.

THE COMING SMOKE.

SEVENTH: Another picture to which this Court was treated was the painting of the complainant standing upon the site of its present acreage and seeing the approach of factories along the north side of Euclid Avenue and the smoke coming toward the Village and then the purchase of the sixty-eight acres by the complainant. Of course this picture was outside of the Record, and so the Village feels entitled to recite the facts required to aid the Court in seeing the *real* situation. At pages 36 and 37 of our affirmative brief as well as in the Record, it is plainly set forth by the complainant as well as by the defense, that no factory or industry throughout the entire Village comes as near to Euclid Avenue as is permitted by the ordinance. It is a further fact that if one were to start at the Public Square in the City of Cleveland where Euclid Avenue begins and were to walk eastwardly throughout the entire length of Euclid Avenue within the City of Cleveland and were to continue along through the three miles or more of East Cleveland and

even if one were to trudge on from East Cleveland straight through to Painesville—a total distance of thirty miles—there would not be a single factory or a single railroad switch or a single spur coming out to the north side of Euclid Avenue with but three lone exceptions (*none* being in Euclid Village) in that *whole thirty* miles. These three exceptions and the ill effects of two of these three exceptions (Builders supply stations) appear at lower portion of page 105 and top of page 106 of the Record; the third instance also, is in Cleveland and is where the industry itself is *next* to the track while the clerical building thereof is nearer to Euclid, but even that clerical building is 200 or more feet from Euclid. So that if the complainant stood upon its land and if it did "see smoke coming" it was smoke from factories located *next* and *bordering* on the railroad tracks. The smoke does not come from factories on or even near to the north line of Euclid Avenue anywhere within the entire length in Cleveland, nor within 20 miles beyond. This oral picture might have been impressive but it was not a painting of the facts as they exist. Though we have faithfully tried to limit this brief to the province of a Reply, and though we have restrained ourselves from the temptation to "reach out" of the Record and point out many convincing developments since the hearing in the trial court, it is felt that in order to answer the complainant's picture, it was necessary and permissible to do so in this one instance.

OTHER ERRORS IN ORAL ARGUMENT.

EIGHTH: (1) In the course of the complainant's oral argument it was stated that the map at page 26 showed the parcel shortly west of the Ambler property and just at the west edge of the Village as being districted for "U 2" district. Propriety forbade any contradiction of

this and other statements, but it is a fact that this map—unlike the defendant's Exhibit 2 which is among the evidence in the Supreme Court—showed but a so-called "tentative" industrial line which was revised after months of additional hearings and investigations upon that one subject, so that the line came 620 feet from Euclid Avenue and thereby left approximately 1000 feet from the track open for industrialism and for allied uses, and in some places—due to the divergence between the track and Euclid Avenue—the industrial territory extends *much* further than 1000 feet from the track. The experts brought by the industrials before the Commission had stated that the ideal and probably greatest depth required would be about 1000 feet from the track and the Commission and council felt that this ideal could be met without injury to the welfare and safety of the community. So it is not correct to have stated that the tractor plant runs beyond the industrial line, for that plant is well *within* the line created by the so-called "*final*" ordinance as shown in the Defendants Exhibit 2; the line on the page 26 map *not* having been the line at the time of trial below nor since.

(2) Nor was it correct for complainant's oral argument to picture the President of the Ambler company as having long passed away, whereas just above the middle of page 140 of the Record the junior Mr. Ambler stated: "My father *is* President of the Ambler company and always has been." And it was the President of the complainant who laid out Cushman Road (East 204th Street) adjoining the parcel in question and who restricted the westerly side of Dille Road and both sides of the Cushman Road for residence purposes alone and these streets are now almost completely built up with single residences as are the three streets west of the Ambler parcel almost completely built up. Their witness, Witzel, at the lower por-

tion of page 155 of the Record, referring to Cushman Road and Dille Road stated: "There are lots of houses going up there now" (in December 1923) in addition to those constructed during the four years theretofore.

(3) Again, incorrectly but with a perfect freedom, the oral argument pictured Euclid Avenue as a business street throughout, whereas neither the Record nor the facts support this assertion. (See pages 34, 35 and 36 of our affirmative brief.) It is a fact that in Euclid Village, except at the "Center," there is not a single store along either side of Euclid Avenue, and this in spite of the fact set forth in subdivision 4 next hereinafter. It is a further fact that throughout its entire length, Euclid Avenue has many more places of residence than of business, and in Euclid Village that is decidedly true.

As to available store frontage.

(4) The incorrectness of the statement in the complainant's oral argument, as to the small amount of store frontage allowed along Euclid Avenue, will become immediately apparent when the Court finds the following three situations: (a) That just as Mr. Ambler himself as well as all other witnesses testified that there was no demand for stores except that there might be some small additional value at the "strategic corners" (and each and every one of these corners *has been* left open by the ordinance for store purposes); (b) Not a single one of these locations where stores are permitted under the ordinance, has been built upon, even though the territory districted for stores constitutes all of the favorable and "strategic corners." With all of this open and available, and not a single store having been built thereon, it must be apparent that the complainant's effort to capitalize the inadequacy of store frontage, is in sharp conflict with the actual facts.

Hundreds of stores possible along Euclid and two thousand throughout entire Village.

(c) But atop of all this, the Court for itself can see how unfounded the complainant's oral assertion is, when the Village points out that along the North side of Euclid Avenue there are 4381 feet of "U 4" frontage open for store purposes and that on the corners of Cushman, Dille, Chardon, E. 212th, Bliss, Babbitt and Upson Roads (E. 260 St.)—lying immediately next to Euclid Avenue itself—there are an additional 2760 feet—"U 4"—for store purposes and that throughout the entire Village there is the aggregate of 41,530 feet—U4—of *frontage* available under the ordinance for store purposes. The average outlying store does not have a 16 foot frontage, but granting this ample frontage for each store, there would be room for 445 stores immediately on and immediately adjoining Euclid Avenue itself and there would be room for 2582 stores throughout the entire Village. None of these figures count in the space now occupied by the stores on Euclid Avenue at the "Center" of the Village where the only stores along Euclid Avenue are located. There are at this center, but 18 stores and business places altogether including even the smallest, whereas there is yet available along Euclid Avenue and *immediately* adjacent thereto, space for 445 *more* stores. A map of the entire United States can readily be printed upon one page of a book, and yet no one would suggest that this country did not have ample territory. In the same way, though the store frontages appear small upon so small a map, it is a fact that a scaling of this map will disprove the impression attempted to be left by the oral argument of the Ambler company, to the effect that so *small* a frontage had been districted for this purpose. More, much more than for decades can be used, is open for such use; and that too, just where Mr. Ambler

testified they are best located and where the ordinance deemed them to be of no injury to the public health and welfare and where they would aid the general welfare.

(5) Nor was it correct to try to impress the Court with the nearness of the so-called "Collinwood Shops," for it is a fact that these shops are located quite north of St. Clair Avenue way over on 152nd Street in Cleveland and it is a fact that a scaling of the County map by the Engineer, shows the Euclid Avenue sidewalk line in front of the Ambler property to be distant approximately *two miles* "as the crow flies" and over *three and one-half miles* as one travels by the nearest street route, and there are many, many streets and houses and buildings intervening.

(6) As hereinbefore pointed out, it was not correct to say that the oral argument shortly before the decision in the trial Court was upon a demurrer, for it is evident that if that oral argument had been upon demurrer, there would have been no place for testimony, evidence and depositions.

(7) Nor is it correct for the complainant to try to tear down this entire ordinance by an attempt to ridicule some of its definitions, for most of its definitions have been validated and many of them have been substantially affirmed by the Supreme Court of Ohio because they were, in great measure, adopted from cases which the Supreme Court of Ohio—as in the *Cummingham case,* 97 O. S. 130—and the Supreme Courts of other states had therefore expressed as sufficiently definite and explicit to be held legal and valid. These definitions are almost identical with those upheld by the Supreme Courts of New York, Massachusetts, Wisconsin, Illinois and in the recent case upheld by the Supreme Court of Ohio and by other states.

(8) The citation by the complainant to exceptional situations and circumstances may be best answered by page 90 of the affirmative brief where the courts are shown

to have declared that it is the *general* application and not the exceptional instance which must control. Perhaps additional affirmative light may be found at page 396 of 280 Federal Report, where that court—ruling in reference to the Railroad Commission—stated that the practical side of the situation must be considered in interpreting legislation.

Notwithstanding failure to prove damage, the complainant seeks to strike down the Entire Ordinance.

NINTH: (1) In our files we have ordinances from New York on the Eastern coast to Los Angeles upon the Pacific and these ordinances are being sent to the Court in order that it may be seen that though local variations naturally occur, the philosophy and the basis of all of these ordinances are alike. Among these are some of the very ordinances recently held valid by the Supreme Courts of Illinois, Massachusetts, Ohio and California.

THE FEDERAL CONSTITUTION FITS ALL.

(2) The complainant was hardly justified by any but rhetorical reasons to attempt to belittle the Village by referring to its having wrapped about itself an oversized coat, for unlike garments of cloth, the Constitution of the United States automatically fits and equally applies to large and small.

There is not a large Constitution for large cities and a small one for small municipalities and so, though the complainant's simile was impressive upon first blush, it will hardly stand the test of a second thought.

If the city of New York may district all parts of its great corporation so as to prevent injury and so as to bring forth the greatest public welfare, then the same procedure is equally constitutional for even the most mod-

est hamlet in the land, and it is this basic right which the complainant assails and which the trial court has stricken down. Indeed, the Supreme Courts of Illinois and Massachusetts found legal justification in the recent decisions which affected mere modest towns.

(3) The complainant not presenting any specific and concrete case of unreasonableness before this Court, it is earnestly submitted that the complainant ought not to be indulged when it microscopically tries to detach certain lines here and there and then asks that upon that basis the entire ordinance should be stricken down. The trial court in its Opinion sweepingly struck down and annulled the entire ordinance, even though as we now believe this Court will agree—the complainant failed to establish damage except upon the theory of an unregulated right to injure the public welfare; and *the trial court also struck down the entire ordinance upon the basic principle of unconstitutionality.* The many well expressed and reasoned Opinions of the many State courts which ruled before as well as those which have ruled since the decision of the trial court, and the unwillingness of the final courts of these States (including Ohio) to follow the reasoning of the trial Court, persuade the country at large to believe that the Supreme Court will lend its validation to the basic principle of constitutionality.

(3b) We venture to say that many well recognized acts—such as the Internal Revenue Acts, the Sherman Anti-Trust Law, the Clayton Act, the Inter-State Commerce Measure and the countless municipal building codes, tenement house regulations and fire-zoning enactments may be found to have some frailty or some flaw in some one sentence or in some one section, and yet the courts have not annulled and will not strike down these entire enactments for any such reason but will await a specific set

of facts to be presented and will then rule adversely only in so far as such case may require.

(4) Beyond all this, it is a cardinal rule of law that contracts, wills, constitutions, statutes and ordinances must be considered as a whole and that to take out one sentence or one paragraph and to interpret or judge it when it stands alone is not within the established rules of interpretation. The many States of the Union, through this test case, submit to this Court that this Euclid Ordinance, taken as a whole and interpreted as a complete fabric, comes properly within the Police Power and properly serves the public welfare, safety and health.

Not meant as an exordium, but intended as an Aid to this Court.

TENTH: (1) It is to be noted that the complainant filed no Reply to the Answer of the Village wherein the Village alleged that the attempted bringing of tracks, spurs, switches and factories up to the North line of Euclid Avenue would result in a menace and injury to the public welfare, safety and health. Nor, in any part of their proof did they trouble themselves to even *try* to show that this would not result in such injury. They take the position that public welfare and its safety and welfare can not be considered as against their right to use their land "entirely unregulated" as they may see fit. They attempt to answer all by the cry of "damage."

(2) The complainant seems to have breathed into this case the feeling that if its property can not be used for what it conceives to be its greatest advantage, that is: if there has been any damage to the complainant, then this ordinance must fall even though such inhibited use may result greatly to the injury to the public welfare, safety and health. In its proof, the complainant has endeavored to convert this

case into a plain and ordinary "damage case." The Village submits that even if the complainant's land can not be used for what the complainant believes is its greatest advantage and even if there be some loss or damage to the complainant, yet that can not, of itself, be the final or sole test, for if the inhibition of the use is or could be related to public welfare and safety, then the damage (even if there were such) would need to yield to the public good. This appears to have been the pronouncement in too many cases to cite, except that it is found forcefully expressed by the highest court of this land in the case of *Welsh vs. Swasey*, 214 U. S. 91, where the height limitation in the Boston ordinance caused great and admitted loss to the owner of the property and yet that loss was not permitted to be the final and exclusive test, for this Court said that such a loss being but an incident to the proper exercise of the Police Power, the damage must yield to and would not be allowed to exclude and defeat the public welfare. So too, in 97 O. S. 130, *State vs. Cunningham* and *In Re Hadacheck*, 239 U. S. 394.

Indeed, in each so-called "zoning" case cited in our affirmative brief, the complainant alleged damage and in most instances this damage was admitted by demurrer and yet the courts of Massachusetts, New York, California, Illinois, Louisiana, Minnesota, Ohio and other States decisively held that even an admitted damage could not preclude the exercise of the Police Power for the public welfare; but in the case at bar, the complainant seems to have so unceasingly shouted "damage" that it has apparently become the central part of the entire situation and has excluded all consideration of the public welfare and of the Police Powers. The complainant insists and demands that this ordinance must be stricken down in order that the complainant may be allowed and able to use its land "entirely

unregulated" even though such use may and plainly will result in damage and injury to the public welfare; for the complainant plainly manifests and asserts that it is not concerned in the public welfare but that it must be allowed to bring switches, spurs and factories up to the North line of the street even though the public safety and health undoubtedly will suffer therefrom; for they demand that damage shall be the sole test.

(3) But even if damage were the sole test, has the complainant proved any damage?

(a) The Bill of Complaint (on page 6 of the Record) alleged that the complainant's land is particularly adapted for industrial development,	But	The proof shows that though the complainant has owned this land for many years entirely unregulated and though the injunction in January 1924 has re-instated its freedom from regulation, not a single factory or commercial structure has even approached its Euclid frontage.
(b) The Bill alleged that factories had lodged along Euclid Avenue,	But	The proof of the complainant as well as the Defendant shows that no factory has come so near to Euclid Avenue as is permitted by the ordinance.
(c) The Bill (at middle of page 5) went so far as to allege prevailing winds from the north in order to show that the high side of Euclid was already damaged and therefore unworthy of being protected against injurious invasion,	But	The proof fails to disclose even one sentence on the part of the complainant, and the Defendant's proof is directly to the contrary.
(d) The Bill (at top of page 5) alleged the "major usefulness" for the Euclid Avenue land to be for mercantile purposes,	But	Mr. Ambler's own statement showed "very little demand" for such purposes and the testimony of Laronge, Greenlund and others showed a greater and earlier return for residence than for mercantile uses, beside Kunkle's statement as to its "natural and logical use."

(e) The Bill (at middle of page 4) alleged that "the larger part of the territory in the Village between the New York Central Railroad and the Nickel Plate Railroad has been purchased by industrial companies which have established plants or are holding sites thereon for prospective industrial improvements,"

But

The proof shows that in this three and one-half mile area between these two tracks there is not a single industry or factory (except fronting on Chardon or Bliss Roads where there are three or four lumber yards and the like) and the proof shows that all of this vast territory between these two tracks lies *open* and *waiting* industrial development.

(f) The Bill alleges a dearth of available industrial land in Greater Cleveland,

But

The proof showed an almost inexhaustible supply all around Cleveland.

(g) The Bill (in Section 8 at the middle of page 5) alleged that the South or hill side of Euclid has "become less desirable for residence use to persons other than those employed in factories there located and preferring homesites close to their place of employment,"

But

The oral argument of the complainant pictured this hillside as designated for residence purposes because aestheticism desired to protect the homes of wealth upon this exclusive hillside.

(h) The Bill (at page 3) recites the building of the New York Central Railroad in 1850 and the Nickel Plate in 1880 and then alleges the need of *all* this land in order to accommodate factories and industry,

But

The proof shows that in these many years, even including the great war cycle boom, only nine industries (including small coal and lumber yards) availed themselves to this land and only sixteen industries (including even the most inconspicuous) have located in the entire Village throughout all these many years.

(i) The Bill alleges that the zoning ordinance was established for mere aesthetic reasons and was designed to keep the Village as a residential municipality,

But

The proof shows that the ordinance allows all usable land along the railroad tracks to be open to industrialism and that there are 14 miles of railroad frontage open and available within the municipality.

(j) The Bill alleges that the ordinance is designed to exclude and ostracize industry from the Village,

But

The proof shows that 1400 acres (substantially more than one-fifth of the Village) are open and awaiting industrial development.

(k) And, in final the Bill continually alleges great damage and the oral argument asserted $200,000 loss,

But

What proof is there of this? Let us see:—

What actual proof of damage?

(1) In order to find what actual proof of damage there may be, it is but fair to say that the complainant's brief unquestionably tried to show its *strongest* proof and yet, as hereinabove set forth, the complainant's brief is unable to cite this Court to any damage other than that based upon supposititious conditions in striking contrast with the actual facts under the ordinance. And in this connection we ask: Why does the Record disclose that the complainant's zealous witness, Kunkle, *always* hedged his statements of damage with suppositions *contrary* to the facts under the ordinance? Why were the complainant's questions *always* premised upon hypotheses in striking contrast with the conditions created by this legislation? Why did Kunkle never even once testify other than upon the supposition that the whole of the sixty-eight acres was districted for residences right down to the railroad track? Why can't the complainant point to the Record and show one statement where this willing witness in plain English and without suppositions, testified to a damage or loss under the *facts* of the ordinance?

Why is the complainant's *brief* compelled to content itself with but mere similar supposititious conditions when it refers to the testimony of Mr. Witzel? And why is the complainant's brief unable to point to any simple or direct statement of Mr. Ambler other than that founded upon "the whole of the sixty-eight acres being districted for residence purposes," which is plainly in conflict with the facts under the ordinance?

Why did the counsel who examined for the Ambler company require all of his and all of the Defendant's witnesses to predicate their answers upon suppositions at *variance* with the ordinance? Why was Laronge compelled to answer upon the supposition that even along and ad-

jacent to the railroad, residences alone would be permitted, and why was Laronge required to testify on the supposition of completely eliminating the Euclid frontage value and then, if damage was plainly proved, why did the complainant's brief have to bolster its cause by citing that testimony as proof of damage? Why, if damage was proved, was the complainant unable to answer the invitation in the Village brief, by citing this Court to *any* non-supposititious proof on the part of any witness?

(2) Perhaps the complainant might have been able to have cited the Court to at least some testimony showing a damage because the complainant's land is districted against bringing factories and tracks up to Euclid Avenue, as their own proof (pages 18 and 22 of our affirmative brief) showed to be a *necessary basis* of any possible loss. But here, as so many times pointed out by the Village, the question of injury to the public welfare comes into play and such a damage (even if it were to be conceded) does not satisfy the burden which is upon the complainant. Indeed, even upon this score the proof not only fails to be clear in behalf of the complainant, but the evidence of some of its own witnesses and the testimony of Whitten, Stein, Greenlund and Laronge is in plain contradiction thereof and may well be said to have not merely met, but satisfactorily *over*balanced the proof of the complainant upon even that phase. It is to be remembered that if, in years to come, conditions become altered, the districting can and (in accordance with the presumption that officials will do their duty and will not act arbitrarily) will be revised; but then it will be a revision in accordance with the general public welfare (as in Fire Zone district revisions) and not to the damage of the public safety and health, at the dictation of some one individual.

These are cardinal rules:

(3) It is to be remembered that (1) the ordinance is presumed to be legal, that (2) the complainant is under the burden of showing that the ordinance neither *is* nor *could* be related to the public welfare, that (3) the ordinance is not invalid if there could have been a valid basis, that (4) the Court will not measure its judgment or substitute its ideas against that of the legislative division, that (5) in order to be unconstitutional, the ordinance must be shown to have no relation to the health or safety and that (6) unconstitutionality must be plainly and palpably clear; (all of this is treated between pages 80 and 90 of our affirmative brief). The complainant had the duty of satisfying each of these requirements. Can it fairly be said that the proof plainly shows that this ordinance has and could have no relation to the public welfare, safety and health, or that damage was plainly proved, or that the other requisites were satisfied by the testimony in the Record? If the declarations in the Bill of Complaint and if the assertions in the complainant's brief are equal to proof, then perhaps it must be conceded that the complainant has convincingly proved damage and has plainly showed that there neither is nor could be any relation between this ordinance and the public welfare and safety, but if the *Record* is the test, then the Village earnestly submits that the complainant has failed to submit proof to satisfy the necessary requisites.

(4) Apparently the complainant finds its greatest shelter in the words of the trial court. But it is to be remembered that in the very first lines of the Opinion (page 52 of the Record) the trial court stated that it had made *no* "special findings of fact" and that "on appeal, the reviewing court can weigh the evidence when taken in deposition form, *as well as the trial court.*" And it is

to be further remembered that it was physically impossible for the Village to have aided the trial court in the interpretation of the testimony, as the complainant has now tried to do in this Court; but now with all the prominent and important evidence having been set forth in the briefs, it is trusted that this Court will "review and weigh the evidence as well as the trial court." No special findings of fact having been made, it would seem that it would not really require any reversal as to the proof or facts, but that now, with the situation completely before this Court, it will, *de novo*, make its determination as to this proof.

Most respectfully, but as an example of the trial court's mis-conception, it is to be noted that Laronge, Greenlund, Whitten and Stein, all testified that the natural, best, and logical way for the development of the strip along the North side of Euclid Avenue was by using it for residence purposes and that thereby the complainant would get a much earlier return and undoubtedly an even greater return, and these witnesses as well as Ambler agreed that store use was "*without demand*" except that Mr. Ambler thought that at the strategic corners (each and all of which *have* been districted for that very purpose) there might be somewhat greater value for store purposes. (All of this is detailed in this and in our affirmative brief.) Added to this unbroken line of testimony, there is the statement of their principal witness, Kunkle, (at the lower portion of page 92 of the Record), where he stated, "*the natural and logical way for the development of that property immediately north of Euclid Avenue* (which is the 620 foot strip in question) *is by allotment for workingmen's homes*" and yet the Opinion of the trial court, in spite of this testimony and that of Greenlund, Laronge, Whitten and Stein, stated that the normal and reasonable use of this property is for commercial purposes and that therefore there was admitted damage.

It is further evident that the complainant can not find much shelter behind the Opinion of the trial court when it is unable to cite this Court to a single out-and-out statement of any witness to prove the obligations which rest upon the complainant, except by citations founded upon suppositions contrary to the facts or except upon possible references of proof founded upon a use plainly injurious to the public welfare, and even that last proof is generously out-weighed by contrary testimony. If the testimony founded upon suppositions strikingly in contrast with the facts, led the trial court to a mis-conception of the testimony, the complainant can hardly now hope that this Court will blind itself to these suppositions or will be indifferent to the fact that the complainant has been unable to *cite* this Court to any actual proof. The mere declaration of damage in the Bill and the mere insistence thereof in the brief can hardly cloud out the absence of actual proof thereof.

The Village most respectfully submits that the decree in favor of the complainant should, upon the *facts as well as upon the law*, become a decree in favor of the Village.

Subsequent Court decisions do not agree with Trial Court.

(5) Referring, in conclusion, to the Opinion of the trial court in reference to the basic question of unconstitutionality, it is evident that the trial court ruled that there could not be *such* an exercise of the Police Power as would bring it within constitutional limitations. In substantiating its purpose, it quoted from and cited the same case that the complainant's brief emphasized—"*Friend vs. Chicago,*" 261 Illinois 16, though, as pointed out in the Village affirmative brief, there is a long cry from a comprehensive zoning ordinance to the isolated restriction in that comparatively old case. With that sincere and genuine

respect for the trial court which the court richly merits, we feel that our trust requires us to point out that though the Opinion of the trial court was given widespread notice and though the briefs in the recent *Evanston* and *Aurora,* Illinois cases urged the Opinion of the trial court upon the Supreme Court of Illinois, that Court refused to follow this trial court and apparently recognized no contrary ruling to be involved in the *Friend* case, and it held that in its judgment, under both the Federal and the Illinois Constitutions, these zoning ordinances are valid. The Opinion of the trial court somewhat stressed the fact that the Opinions of The Justices was but a moot ruling. However, when the Supreme Court of Massachusetts later had its attention called to the Opinion of the trial court, it, in three successive decisions, stated that it felt these zoning ordinances to be valid under the Federal Constitution. Though the Opinion of the trial court dismisses the favorable decisions of New York as "assumed rather than decided"; thereafter, in the most recent pronouncement of the highest court of New York, that court refused to follow the Opinion of the trial court in the case at bar and once more reiterated its belief that these ordinances are legal under the Federal as well as under the New York Constitutions. In the California case cited in our affirmative brief, the Supreme Court of California had not yet had that case, for it was in but the lower court at the time our trial court ruled. When the California final court did receive the case, the Opinion of our trial court was generously quoted and cited in the briefs. The Supreme Court of California declined to concur in the reasoning of our trial court and pronounced its belief that this ordinance did not offend either the Federal or California Constitutions. Though the most recent decision of the Supreme Court of Kansas was rendered after the objectors in that State had invited their court to the

decision of our own trial court, nevertheless the Supreme Court of Kansas reaffirmed its belief in the legality of this ordinance under the United States as well as under the Kansas constitution. The same is apparent in reference to the cited decisions in the District of Columbia, which ruled favorably after the unfavorable Opinion of our trial court. And so too, in Ohio, our own Supreme Court declined to follow the reasoning of the trial court even though the present counsel for the complainant, as *amici curiae*, urged the Opinion of the trial court against the validity of the Cincinnati zoning ordinance. Indeed, since the pronouncement by the trial court in January 1924, no court of final resort in any State has similarly decided. In each of these cases, both before and since the Opinion of the trial court, damage was alleged and frequently admitted by demurrer and yet these courts, in addition to Minnesota, Wisconsin and Louisiana, ruled that there being an apparent relationship between these ordinances on the one hand, and the public safety, welfare and health on the other hand, they were proper expressions of the Police Power and did not offend against either the Federal or the respective State constitutions.

This judgment is apparently concurred in by the legislatures of thirty-one States which have passed Enabling Acts, by Congress, and by practically every big city in the United States, for these ordinances have been adopted in practically all large cities as well as by hundreds of smaller municipalities and now the States and cities, from coast to coast, trustfully look forward to a final validation by the highest Court of their land.

Respectfully submitted,

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